

**COMMONWEALTH OF MASSACHUSETTS**  
**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Rulemaking by the Department of Telecommunications )

and Energy, pursuant to 220 CMR §§ 2.00 et seq., to )

promulgate regulations governing an expedited dispute )

**D.T.E. 00-39**

resolution process for complaints involving competing )

telecommunications carriers as 220 CMR §§ 15.00 et seq. )

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**REPLY COMMENTS OF BELL ATLANTIC-MASSACHUSETTS**

In its Reply Comments, Bell Atlantic-Massachusetts ("BA-MA") responds to arguments made by other parties' in their initial comments, filed June 28, 2000. Nothing in those comments provides a basis for the Department to establish rules for an expedited carrier dispute resolution process which differ from the recommendations of BA-MA.

Specifically, as discussed in BA-MA's Initial Comments, the Department should modify its proposed rules by providing for a process that: (1) is voluntary and mutually invoked by the disputing parties; (2) does not supplant contractual dispute resolution terms between the parties; (3) has no binding effect in other separate proceedings; and (4) reflects the same time intervals determined by the Federal Communications Commission ("FCC") for its *Accelerated Dockets*. Those recommendations are fair and reasonable and would promote efficiency and ease of administration, without unduly interfering with parties' due process rights and ability to reach a negotiated settlement.

**I. DISCUSSION**

## A. Voluntary Application of the Expedited Process

One of BA-MA's overriding concerns with the parties' initial comments is their presumption that the expedited process can be invoked unilaterally by one party. For the reason articulated in BA-MA's Initial Comments, this process should be voluntary, *i.e.*, applicable only where *both* parties agree that the issues raised are suitable to being handled on this basis. If mutual agreement is required, then one party cannot use this to its competitive advantage by unilaterally electing the expedited process in the most complex cases, knowing that the other party would be afforded insufficient time to prepare an adequate defense. Therefore, the most fair and reasonable approach to protect the due process rights of all concerned is to utilize those procedures only with the consent of all parties to the dispute. This not only reflects "fast track" procedures in other forums, but is also consistent with the voluntary accelerated mediation process that, upon mutual agreement of the parties, will be incorporated into future and existing carrier interconnection agreements to resolve carrier disputes.

## B. Time Intervals

The time frames for various events under the Department's proposed dispute resolution process should not be shortened, as some parties suggest. In particular, RLI/Covad's proposed schedule is so compressed that it would cut in half the time allowed by the FCC to complete the accelerated process. This is an extreme example, and would clearly deny parties adequate time to respond to pleadings, prepare for hearings and conduct ongoing negotiations, especially if calendar (not business) days are used to calculate the intervals.

Other parties propose to shorten specific intervals or even eliminate certain steps entirely from the expedited process. For instance, AT&T recommends the elimination of the ten-day pre-filing requirement for negotiation between the parties under 220 C.M.R. 15.04(3). The Department should reject such recommendations, and should instead adopt a new schedule that would expand the Department's proposed time intervals to ensure consistency with the schedule established by the FCC. This would afford parties a better opportunity to prepare and present their cases and would provide them with an opportunity to resolve their dispute prior to hearings. Moreover, consistency of time intervals would minimize any unnecessary administrative burdens on parties.

Notwithstanding the above, BA-MA has no objection to modifying the Department's proposed rules to allow parties to **mutually agree** to waive the baseline time intervals established by the FCC and incorporated into the Department's rules, in favor of shorter time intervals on a case-by-case basis. For example, parties could mutually agree to no mediation period, or a period shorter than 20 days, as AT&T suggests, if parties do not believe this time would be worthwhile in a particular dispute. Likewise, parties could mutually agree to waive the 10-day minimum for filing for expedited review, as NECTA recommends. Indeed, **any** of the time intervals could be reduced by mutual agreement of the parties based on the particular circumstances of the dispute. This is a reasonable approach which provides parties with some flexibility in advancing the timing of the

expedited dispute resolution process while retaining the time intervals established by the FCC as the **standard** under the Department's rules.

Finally, BA-MA agrees with AT&T and others that the Department should clarify whether it means "calendar" or "business" days in the context of its proposed rules. AT&T's proposal that the Department use the definition in 220 C.M.R. 1.02(4) is acceptable provided that the intervals calculated on that basis are at least as long as the those established by the FCC in its *Accelerated Dockets*. In addition, a cross-reference should be included if this definition applies to the new rules for expedited dispute resolution.

### **C. Effect of Carrier Interconnection Agreements**

BA-MA agrees with AT&T that where an interconnection agreement provides for a dispute resolution process, the contractual provisions should govern in any carrier disputes. This would properly reflect the intent of the contracting parties, and no substitution of the Department's rules is warranted.

### **D. Awarding of Damages and Granting of Injunctive Relief**

MCG/RCN/Vitts jointly seek an ability to bifurcate the proceeding to address liability and damages separately. This is inappropriate because the Department does not have the ability to award damages as a matter of law. Commonwealth v. Diaz, 95 N.E. 2d 666 (1950). Likewise, NECTA's request that the rules allow for injunctive relief or other such remedies must be rejected because the Department has no legal authority to issue injunctions and must seek enforcement through the Supreme Judicial Court under Mass. General Laws c. 159, §40.

It is well established in Massachusetts that an administrative agency has only those powers that are conferred upon it by statute. No statute gives the Department that authority. On the contrary, Mass. General Laws c. 159, §40 expressly provides that if the Department seeks to enjoin the conduct of a common carrier, the Department must bring an action in the Supreme Judicial Court to obtain an injunction. Thus, even when the Department seeks to enforce its own orders, it can only obtain that relief from the courts. Moreover, permanent injunctive relief is only available in a court if the party prevails at trial; it is not available before an adjudication on the merits.

Accordingly, the Department should reject the inclusion of any provisions relating to awarding damages or granting injunctive relief in its rules for expedited dispute resolution.

## E. Other Issues

RNK recommends that the Department incorporate into its rules specific outside time limits for discovery. BA-MA agrees that this is appropriate and, in that regard, proposes that the discovery period close no less than 10 days before hearings commence.

In addition, BA-MA has no objection to NECTA's recommendation that the Department issue a tentative decision regarding removal of a case from the expedited docket process and allow parties an opportunity to comment. However, the "clock" should be stopped while this exchange of comments occurs to ensure that the time remaining under the expedited process is preserved.

Finally, in response to MGC/RCN/Vitts' request that parties be required to produce all relevant documents and simultaneously serve all parties, this is common practice, and no further modification to the Department's rules is required.

## II. CONCLUSION

BA-MA supports an expedited dispute resolution process subject to the recommendations made in its initial and reply comments submitted in this proceeding. A **voluntary** process that affords adequate time to litigate and/or negotiate the issues is a fair and reasonable alternative means of addressing carrier disputes.

Respectfully submitted,  
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,  
d/b/a Bell Atlantic - Massachusetts

Its Attorney,

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